

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

In Re: Bard IVC Filters) MD-15-02641-PHX-DGC
Products Liability Litigation)
)
) Phoenix, Arizona
) **October 4, 2018**
)
)

BEFORE: THE HONORABLE DAVID G. CAMPBELL, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

CASE MANAGEMENT CONFERENCE

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PROCEEDINGS

THE COURT: Please be seated.

Morning, everybody.

EVERYBODY: Morning, Your Honor.

THE COURT: We set this time to talk about scheduling and other matters related to the bellwether trials that remain, plus a few additional issues.

Let me tell you the issues that I identified that we ought to talk about. We need to decide which plaintiff is going in the February bellwether trial, Mulkey or Tinlin. We need to decide whether Ms. Mulkey looks like she's going to be able to have a trial by May. If not, then we need to find another bellwether plaintiff for her.

I indicated in an order that was entered a few months ago that we will talk about whether there should be a sixth bellwether trial in this MDL since the Kruse case was eliminated by summary judgment.

We need to set the schedule for what's going to happen before the February and May trials.

We need to talk about the Simon Nitinol cases. And I've read the two submissions from the parties on those.

I want to talk to you a little bit about the form of jury instructions that you submit.

We probably ought to talk about the motion to seal

11:03:13 1 issue for the Hyde case as well as the Jones case.

2 By the way, on an issue that came up during the
3 trial, which was whether the Jones redactions applied in
4 Hyde, I noticed -- actually, Jeff noticed and pointed out to
11:03:28 5 me that we addressed that at the final pretrial conference in
6 this case and I entered an order saying that Jones redactions
7 apply in Hyde. So that was a matter that we covered then.

8 We probably ought to talk about whether that is true
9 for the next trial as well so there's no ambiguity on
11:03:47 10 redactions.

11 Those are the issues I've identified. Do you have
12 others you think we ought to put on the list?

13 MR. NORTH: Nothing for the defendant, Your Honor.

14 MR. LOPEZ: Nothing for the plaintiffs, Your Honor.

11:03:59 15 THE COURT: Okay. Let's talk then, first, about
16 which case should be tried in February.

17 Plaintiffs' counsel, what are your thoughts? Among
18 other things, you were going to check where Ms. Mulkey is in
19 terms of her condition.

11:04:26 20 MR. LOPEZ: Well, I mean, I'm looking at your CMO
21 Numbers 36. I think we've been -- at least I know from the
22 plaintiffs based on that CMO that Tinlin was already in place
23 to try in February. But maybe I read it wrong. It says "The
24 Court will plan to try the Tinlin and Mulkey cases in February
11:04:49 25 and May."

11:04:52 1 THE COURT: Read the next sentence.

2 MR. LOPEZ: "The Court will decide the order of the
3 trials" -- Okay.

4 THE COURT: I think that was left open.

11:05:01 5 MR. LOPEZ: And we should discuss it because when --
6 you gave a scheduling order for the Tinlin case.

7 So we've tried a G2 case, we've tried an Eclipse
8 case, and we've tried maybe a G2 -- well, we certainly tried
9 a G2X case. Whether or not that's where that comes out on a
11:05:19 10 product ID issue, we're still waiting for that.

11 We need to try a Recovery case.

12 I know counsel will be quick to point out that the
13 Recovery cases only make up about 11 percent of the docket,
14 but from a global perspective, historically from what's
11:05:41 15 happened in the past cases and just looking at the evidence
16 and the injuries that happened with the Recovery, and,
17 frankly, the potential for the plaintiff, and I don't want
18 anyone to quote me on this because people that are trying to
19 settle G2X and G2 and Eclipse cases are going to say why did
11:06:02 20 you say it, but I'm going to say it. 11 percent of the cases
21 are probably 50 percent of the value the global litigation.
22 I mean, the Recovery cases simply have more value for a
23 number of reasons. Mainly because of the liability case,
24 potential for punitives and, frankly, the damages that are
11:06:19 25 caused by the Recovery.

11:06:22 1 If we want to get a true bellwether snapshot of
2 these cases, I think we have to try a Recovery case.

3 THE COURT: Mr. Lopez, not to interrupt, I've already
4 agreed with you on that, that we should try a Recovery case.
11:06:36 5 That's why we put Tinlin in.

6 MR. LOPEZ: But I think it should be the next case.

7 THE COURT: The question is which do we take next,
8 because we're going to try them both.

9 MR. LOPEZ: I understand. I think the next should be
11:06:45 10 a Recovery case. We don't need to try an Eclipse case next.
11 I think we need to try a Recovery case to get a better idea of
12 where we are on four different products. I don't think it's
13 going to do us much good from a bellwether standpoint to try
14 another Eclipse case.

11:07:04 15 THE COURT: Are you saying we shouldn't try Mulkey?

16 MR. LOPEZ: Maybe. Yeah. I think I might be saying
17 that. If the purpose of this process is to get the parties to
18 kind of get a feel for what's going to happen if you launch
19 all these cases back to the transferor courts, I think it may
11:07:30 20 not -- we may not have to try another Eclipse case. I think
21 we need to see what an Arizona jury's going to do under your
22 guidance with a fourth case. I mean a fourth model, and that
23 being the Recovery.

24 You know, one of the things I will say, Your Honor,
11:07:48 25 we addressed this last time we were before you, the cases are

11:07:51 1 settling as they get close to trial in state courts. And
2 there's been G2, G2X cases, couple Recovery cases that have
3 settled. And I think if this case is going to resolve
4 globally, we either have to start talking about that now on a
11:08:07 5 G2 and Eclipse, and maybe after this verdict a G2X case. We
6 know how we're each going to try those three cases and we
7 know kind of what the feel of that case is and where -- what
8 might happen to those cases if we do start trying those cases
9 outside of the MDL.

11:08:29 10 These -- all these cases do not have to be remanded
11 at the same time. We know what a G2 case will do at least in
12 a bellwether process, an Eclipse case, and soon we'll find
13 out what's going to happen with a G2X case.

14 I think, unless counsel wants to engage in
11:08:45 15 discussions about G2 and Eclipse cases now, because we've got
16 two bellwether cases that have gone to verdict, both we've
17 both seen each other's -- we didn't hold anything back, we
18 put everything on the table as to how those cases are going
19 to be tried.

11:09:02 20 Either those cases are going to settle because of
21 the experiences we had with those two bellwether trials or
22 they're not. And to keep trying them here is not going to
23 change anybody. It's not going to change what's going to
24 happen here with respect to is there going to be a settlement
11:09:18 25 here before you have to remand those cases.

11:09:21 1 And I -- I think we either engage in some kind of
2 global discussion about G2 and Eclipse cases, and potentially
3 a G2X case, or we just remand them.

4 I mean, I'd rather spend -- I shouldn't say it this
11:09:38 5 way. Not rather. But I think it would be a good thing for
6 us to spend our time educating 300 plaintiffs lawyers, or
7 however many remain now being in this MDL, how to try these
8 cases, especially for a G2 and Eclipse case.

9 As far as Recovery cases, those cases are settling.
11:10:00 10 I mean, they're getting close to the courthouse steps. We
11 can't share with you how they're settling, but they're
12 settling for values that are allowing them to settle without
13 trial.

14 If the defense thinks we need to try a Recovery case
11:10:18 15 to figure out what position they're going to take and what
16 values they want to continue to put in those cases, then we
17 ought to try one. Or we ought to maybe use the experience
18 we've had on already litigating -- the Judge Jones case that
19 we tried was a Recovery case. 11 days in trial. And that
11:10:35 20 case settled four years ago. And there hasn't -- and until
21 another Recovery case gets to the courthouse steps, they
22 don't settle. So either they want to settle Recovery cases
23 because we've had that experience or we ought to try one here
24 and see whether or not that moves them or us to have -- we're
11:10:54 25 ready to talk about all these cases. It's just really a

11:10:58 1 matter of what the defense is going to do.

2 I remember Mr. North said sometimes near the end of
3 the year we have this gap between now and February. At the
4 very least we should either convince you that the cases can
11:11:10 5 or cannot settle here as far as G2 and Eclipse case, or, like
6 you said, they have to be remanded. And I think that that's
7 what's going to have to happen to get these cases resolved --
8 lot of these cases, Your Honor, are five, six years old.

9 And if -- if defendants' strategy is to wait until
11:11:32 10 we get trial dates, then we need to go get trial dates for
11 these people, as opposed to going through a process that
12 maybe is not going to really mean anything to them as far as
13 coming together and dealing with the mass of cases that have
14 been filed here.

11:11:46 15 THE COURT: Okay.

16 MR. LOPEZ: So I'm strongly advocating that if we try
17 another case, it has to be Recovery case.

18 THE COURT: Okay.

19 MR. NORTH: Your Honor, if I could come to the
11:11:54 20 podium.

21 Your Honor, we are committed to this bellwether
22 process. I think that we, both parties and the Court, years
23 ago came up with this process to try to determine values of
24 cases for global settlement. We think it's important to take
11:12:15 25 this process to conclusion. For a number of reasons.

11:12:18 1 Mr. Lopez says, well, we've tried a G2, we've tried
2 a Eclipse, we know what those are worth.

3 The problem is the identity of the filter involved
4 in a case is only one data point. All we've tried are
11:12:34 5 fracture cases here. Three fracture cases. The latest data
6 we have, through August 17 of this year, is that 20 percent,
7 I think 20.4 percent, of the cases in this MDL involve a
8 fracture. Less than .4 percent involve a migration. And the
9 rest are much more less intrusive, less serious injuries.

11:13:01 10 Well, we're only trying the most severe cases, the
11 fracture cases. And we think it's very important to try at
12 least one case where you don't have sort of more dramatic
13 injury. And that would be the Mulkey case. Which represents
14 80 percent of the case inventory.

11:13:19 15 We think it's important to try that case just like
16 they think it's important to try a Recovery filter case.
17 Which, unlike Mulkey representing 80 percent of the
18 inventory, Recovery cases represent about 9 percent of the
19 inventory.

11:13:35 20 But we understand the Court's reasoning and
21 plaintiffs' reasoning for wanting to include that.

22 We think this process needs to go to conclusion.

23 Your Honor, as far as us not settling until the
24 courthouse steps, that is wrong. We've had meaningful
11:13:49 25 settlement discussions in a number of cases that Mr. Lopez

11:13:52 1 was not involved in. We tried the Maricopa County -- settled
2 the first four Maricopa County cases that were set in front
3 of Judge Brodman approximately three months before the trial
4 date. At least two months before the trial date. We settled
11:14:08 5 another case at least two or three months before the trial
6 date.

7 Now, as far as Ms. Mulkey goes, Mr. Lopez did not
8 address the Court's original question, which was what is her
9 health condition.

11:14:20 10 We have obtained all the medical records we can thus
11 far and they suggest the following: Ms. Mulkey reported
12 these symptoms of fainting last spring. She went through an
13 extensive battery of tests this summer. Tilt test, all sorts
14 of cardiac tests, all sorts of everything. All the test
11:14:44 15 results were normal. None of the medical records we have
16 been able to obtain indicate any diagnosis. And there could
17 be some later medical records that we have not obtained yet,
18 but everything that we've seen shows that she has not had an
19 episode like this since the spring.

11:15:01 20 Again, I'm just telling you what we can tell from
21 the records.

22 She has not been diagnosed with anything because --
23 as far as we can tell, because all of the test results are
24 normal.

11:15:12 25 Now, the plaintiffs have come into this court in the

11:15:14 1 past and said that her doctors did not want her to travel.
2 That does not seem to be quite the case from the records.
3 There's actually a medical record where the doctor
4 memorialized a conversation where her attorney, it's not one
11:15:29 5 of the lead attorneys but her attorney called and said "Can
6 she really travel for this trial?" And the doctor said "I
7 can't tell you until we get these test results back," was all
8 he said. There's no travel ban in there.

9 So unless they have some new medical information
11:15:49 10 that we have not been furnished, we believe she should be
11 ready for trial.

12 And we also believe that it is very important, as I
13 said earlier, that we try at least one bellwether case that
14 does not involve a fracture like the previous three and like
11:16:05 15 Ms. Tinlin.

16 Now, if I can go to the Tinlin case just a minute,
17 Your Honor, there are other issues that I think militate
18 against trying the Tinlin case in February. And would
19 suggest it ought to be in May.

20 And that's the fact that this Court, with the
21 agreement of the parties, I think, imposed a very aggressive
22 discovery schedule to get Tinlin ready. Well, thus far, Your
23 Honor, that schedule is simply not working. And I must say,
24 through no fault of my team, in my view.

25 We have obtained all of the medical records as fast

11:16:43 1 as we can. There are some records right now that the medical
2 record collection company has but we can't review because the
3 orders, previous orders, give the plaintiffs ten days to
4 review those records before they can be turned over to us
11:16:59 5 once they're obtained. We've contacted them several times in
6 the last ten days to ask them to waive that ten-day time.
7 We've heard no response.

8 The scheduling order also requires us, in reviewing
9 the records, to identify any physicians that we want to
11:17:16 10 depose. It required us to do so and required those
11 depositions to be taken by October 5th.

12 We made a request beginning on September 18th
13 identifying the doctors we wanted to depose. And we can't
14 call the doctors. Under the scheduling order, we have to
11:17:36 15 tell the plaintiffs who those doctors are and they call the
16 doctors.

17 We advised them on September 18th. My team has
18 written at least two follow-up or three follow up e-mails
19 asking them, please give us dates. I had a telephone
11:17:51 20 conversation with Mr. O'Connor saying we need these dates.

21 We are now on October 4th, two and a half, three
22 weeks later, and we don't have any dates for these
23 depositions. They were supposed to have been completed by
24 yesterday -- I mean tomorrow. Mr. O'Connor approached me
11:18:10 25 last week and said we need a two-week extension because they

11:18:14 1 were supposed to designate their experts on September 28th.
2 And I've never been one, and don't intend to ever be one, to
3 deny the other party reasonable extension.

4 And I told Mr. O'Connor, I said that's fine, but we
11:18:28 5 need to delay this October 5th deadline, too, to get these
6 depositions scheduled so we can get them done. He agreed.

7 We put in that order that the Court signed that that
8 deadline would be changed to October 19.

9 Well, here it is October 4 and we still don't have
11:18:47 10 dates for these depositions. And the odds of getting dates
11 from busy doctors by the 19th is very difficult.

12 And then all of the other deadlines for Tinlin build
13 upon that deadline. It's difficult for our experts to
14 prepare detailed reports, the sort that we can then have them
11:19:06 15 testify, without an understanding of present medical
16 condition.

17 THE COURT: Do you know the date I entered the order
18 extending the dates? Or the docket number.

19 MR. NORTH: Yes, Your Honor. It is Docket 12759.

11:19:43 20 THE COURT: Would you print that, please, Traci.

21 Go ahead, Mr. North.

22 MR. NORTH: Under that, as the Court will see, the
23 parties are supposed to have completed depositions by
24 October 19. Again, as I mentioned, we've been requesting
11:19:55 25 those depositions, we've identified the doctors, they've had

11:19:58 1 that information since the 18th of September.

2 I understand everybody's busy with trial. But my
3 point is I don't believe this Tinlin schedule is going to
4 work to have the case to get through motions, any *Daubert*
11:20:11 5 motions that might be appropriate, any motions for summary
6 judgment that may be appropriate, until we get this discovery
7 completed. And it's not off to a good start.

8 So far all those reasons, Your Honor, we believe
9 it's appropriate to try the Mulkey case in February.

11:20:31 10 Do you want to look at that?

11 THE COURT: No.

12 MR. NORTH: Try the Mulkey case in February and
13 followed by the Tinlin case in May.

14 Now, if Ms. Mulkey's attorneys come back and say she
11:20:42 15 cannot testify still, we would ask the Court just for the
16 opportunity to verify that, and with a short telephone
17 deposition of her physicians, if there's some report to us
18 from the attorneys that she cannot testify. Unless they have
19 a medical record that states that. Because right now her
11:21:02 20 medical records do not indicate anything about her being
21 unable to travel.

22 THE COURT: Okay. Thanks.

23 Give me just a minute to look at this order.

24 All right. Plaintiff's counsel, would you please
11:22:07 25 respond.

11:22:08 1 MR. LOPEZ: Yes, Your Honor. First on Mulkey, you're
2 right, I forgot to address Mulkey. I have to actually read a
3 text from Mr. DeGreeff.

4 "Just talked to Debbie Mulkey. This is my
11:22:23 5 understanding of her current status, but I did not have a
6 chance to speak with the doctor. The neurologist did not
7 find any neurological problems. Debbie has been released at
8 this point by a neuro on sort of a, quote, wait and see, end
9 quote, basis. If she has another significant episode, she
11:22:38 10 may have to go see other specialists."

11 So that's it. I mean, I agree that's probably --
12 there's probably not a medical reason any more -- I don't
13 want to speak for her and I read you verbatim what I got from
14 Mr. DeGreeff. And I don't think that really is the issue,
11:22:55 15 whether or not her case can be ready before Ms. Tinlin's.

16 Mr. North's right, we asked for an extension. We're
17 in the middle of trial and we wanted to make sure that the
18 right people put -- I know -- I was going to address that
19 today with them. I'm working on the Tinlin case today.
11:23:12 20 October 19th is not here yet. And I think Mr. Stoller just
21 sent an e-mail to folks that are working on it. We probably
22 can have a report to them by the end of the day.

23 But I think we ought to talk about something that's
24 maybe the issue we should be more focused on. Number one is
11:23:31 25 we put a lot of work into the Kruse case and that case was

11:23:37 1 getting ready for trial and, of course, the Court ruled on
2 the motion for summary judgment. The same motion is pending
3 in the Mulkey case.

4 If that -- it could be that that might be something
11:23:50 5 we need to address sooner rather than later, Your Honor,
6 because if that case -- if you're going to rule on the
7 statute on the Mulkey case like you did in Kruse -- I don't
8 know what the issues are so I can't -- but I think that's
9 something -- we don't want to have that case be marched into
11:24:05 10 trial if in fact it's going to get dismissed because of the
11 statute of limitations.

12 There is a practical way for us to deal with
13 everything Mr. North said and still satisfy what I think is
14 the most important thing in a bellwether process, and that is
11:24:22 15 to get a better global picture of these cases, including a
16 device that has not been tried yet.

17 I don't think there should be a fourth bellwether.

18 I don't think anyone is going to learn anything from
19 trying another Eclipse case. We know what the Eclipse
11:24:36 20 case -- they tried an Eclipse case here. Values, you know,
21 that's just at matter of getting -- people getting in a room
22 and figuring that out.

23 THE COURT: But, Mr. Lopez, what is your response to
24 his point that we need to try a non-fracture case?

11:24:58 25 MR. LOPEZ: Well, Kruse was a non-fracture case,

11:25:01 1 right? Oh, it was migration. It was irretrievable. Of
2 course it got kicked on the summary judgment motion.

3 I don't think that's necessary, Judge. I really
4 don't. To spend the kind -- I mean, those are the kind of
11:25:18 5 cases, I know, in an MDL when people have a lot of cases,
6 those settle with the cases that have larger value.

7 I mean, people -- sitting alone, people aren't going
8 to spend the kind of money we spend in these cases to try
9 these cases. That's the kind of case where we send that back
11:25:40 10 to the transferor court. Everything's going to be tried by
11 videotape because they're not going to be in Phoenix.
12 They'll probably have to do de bene esse depositions of all
13 these experts. They can't be everywhere. And it just
14 simplifies the economies of the cases being tried.

11:26:00 15 So if we try a non-fracture case and for some
16 reason -- and that case gets a verdict that is higher than
17 maybe they would have paid in settlement, that's not going to
18 set a new value for them to settle those cases. It's not.
19 They're going to put people to the test of spending the kind
11:26:14 20 of money you have to spend on a case like that in order to
21 either drive the value down or not. That's just the
22 practical reality of what happens with these cases.

23 So everyone knows that a non-fracture case does not
24 have the same value as these cases that are going to trial
11:26:32 25 that have larger injuries. I don't think we're going to

11:26:35 1 learn anything from that. And I don't think it's going to
2 move the defendant to do anything different than they might
3 have done had we not tried one of those.

4 In other words, whether they get a low-value verdict
11:26:48 5 or defense verdict and somehow or other those cases bring a
6 value here that is much higher than they think those cases
7 are worth in settlement, it's not going to change their
8 opinion about those cases. They're going to have to continue
9 to have certain value for those cases.

11:27:04 10 And I just think that, you know, this case didn't
11 start in 20 -- what is it 15 we got sent to MDL? Been three
12 years. There's a lot of history and there's been a lot of
13 history since. I just don't think there's much to be learned
14 here from the standpoint whether or not you need to remand
11:27:24 15 the cases.

16 THE COURT: Well, let me -- let me -- let's talk
17 practical timing for a moment.

18 Under the extension that's been granted, updated
19 medical records are to be identified -- actually, are to be
11:27:46 20 obtained and any new treaters identified by October 12th.
21 Plaintiffs -- I'm sorry. Physicians and fact witnesses to be
22 deposed by October 19th.

23 Plaintiffs' case-specific experts are due on
24 October 12th. Defendants' case-specific experts are due on
11:28:10 25 November 9th.

11:28:13 1 The parties didn't ask for a change on the
2 deposition deadline for case-specific experts, so that is
3 still November 16th, which is seven days after defendants'
4 expert reports are due. Is that feasible?

11:28:32 5 MR. LOPEZ: We're working on it. We're working hard.
6 I think it is, yes.

7 THE COURT: How many plaintiff-specific experts will
8 there be?

9 MR. O'CONNOR: I can address that.

11:28:40 10 What did we say, Paul, three or four?

11 We think about five.

12 THE COURT: So if you have five plaintiff-specific
13 experts and the defendants have counter-experts, that's eight
14 or ten depositions. How are you going to get that done in a
15 week?

16 MR. LOPEZ: Well, two are economists; right? And
17 three are the same -- three of the same people that have been
18 testifying --

19 THE COURT: Are they going to need to be deposed?
20 Are you waiving depositions on the experts?

21 MR. LOPEZ: No.

22 THE COURT: Then all that's going to have to happen
23 under this schedule between October -- I'm sorry, November 9th
24 and November 16.

25 MR. LOPEZ: Like I said, we're working on that and

11:29:27 1 we'll make it happen.

2 THE COURT: Mr. North.

3 MR. NORTH: Your Honor, that's the problem. We were
4 committed to give them the extension to try to make that
11:29:37 5 happen, but there's no way now that we're going to even meet
6 this October 19th deadline.

7 There are medical records sitting at Marker, the
8 group that collects them. We can't get a response to them to
9 waive the ten-day period so we can look at them. We can't --
11:29:51 10 we've identified the doctors we want to depose three weeks
11 ago based on the records we have. We're waiting for other
12 records for them to release those to us to see if there are
13 more.

14 I don't see how the doctors we need to depose can be
11:30:04 15 deposed when they don't have dates for them and they're
16 supposed to be deposed in 15 days from today.

17 I mean, it's logistically very difficult. How many
18 experts we need? Probably two or three. But until we see
19 these medical records -- and her condition, as the Court
11:30:21 20 knows, is very complex because of very debilitating MS, and
21 the issues as far as differentiating between this complex
22 medical condition and any injury from the filter puts this
23 case at a whole different level as far as medical issues. We
24 just don't see how these deadlines are going to work. We're
11:30:44 25 committed to trying, but at this point I'm not sure that's

11:30:46 1 enough.

2 THE COURT: Plaintiffs' counsel, is it true you were
3 asked for dates for physician depositions on September 18th
4 and still have not provided them to defense counsel?

11:30:57 5 MR. LOPEZ: We were in the middle of trial. There
6 were others -- that's when we went to Mr. North and said we're
7 the ones that need to deal with that, can you give us a
8 two-week extension. I know that's being worked on.

9 But, Judge, let me say this. They can have all the
11:31:12 10 time they want. I don't care if we're taking defense expert
11 depositions a week before trial. I really don't.

12 If they think they're prejudiced by this and they
13 want to move these things so they have more time, give us an
14 opportunity to fulfill the new schedule, like I said we're
11:31:27 15 working on it. I don't see any reason we can't get that
16 done.

17 If they're concerned about their response, they can
18 have all the time they want.

19 The other thing I was going to suggest, Judge, I
11:31:37 20 don't know where you are on this, if we need a fifth
21 bellwether, I don't think we do. I really don't. I think
22 from my perspective I need to speak for a lot of people.
23 They want their cases to either resolve or they want their
24 cases to go back so they can get them marching towards a
11:31:54 25 trial date and try the case. And I'm not even sure how much

11:31:56 1 attention they're paying to what's happening here other than
2 waiting to see if the cases settle here. And we're not
3 gathering that much more information than already existed in
4 these cases.

11:32:10 5 THE COURT: I understand your point on that.

6 MR. LOPEZ: So I would suggest this --

7 THE COURT: Let me introduce another complication.

8 I came in here this morning intending to compress
9 the schedule for the February trial, not expand it.

11:32:21 10 Under the current schedule we don't finish *Daubert*
11 and motion for summary judgment briefing until January 11.
12 That's too late for me. I'm going to be in criminal trials
13 starting the next Monday until the start of the bellwether
14 trial. I've got them double booked. I'm not going to have
15 time to work on motions for summary judgment and *Daubert*
16 motions.

17 So I was going to tell you we need to compress the
18 schedule so we can get all of the briefing done by the end of
19 December. That means moving the motions even earlier, which
11:32:51 20 sounds like it's going to clash with the extended discovery
21 that's going on.

22 MR. LOPEZ: Well, what I was going to suggest is
23 this: We don't need a May bellwether trial date. That's my
24 opinion. That's what I'm saying to you. And if you -- based
11:33:07 25 on your schedule, based on what counsel said about being

11:33:10 1 jammed up, the best way to resolve this is make this the last
2 final bellwether and move it to March. Or move it to --

3 THE COURT: I can't try it in March or April. Those
4 months are fully booked. Only time I have available for
11:33:24 5 bellwether trials in this case are February and May. So if we
6 don't try a case in February, we don't try a case until next
7 May, which, to me, makes no sense.

8 MR. LOPEZ: No, I agree.

9 THE COURT: Let's see --

11:33:44 10 MR. LOPEZ: I understand you're shortening the
11 schedule. From the plaintiffs' perspective we don't think
12 it's beneficial to this MDL or this process to try, number
13 one, to get involved in maybe discovering a case where we
14 didn't know where Your Honor's going to be on the MSJ on the
11:34:01 15 statute. So if that -- if you rule against the plaintiff on
16 that, then Tinlin is the next case and it will be a May date.

17 I mean, I would prefer that if this -- if the idea
18 of maybe dealing with the G2 and the Eclipse cases is not
19 something counsel's interested in or you're interested in
11:34:23 20 remanding, that we have a hiatus, we try a Recovery case in
21 May. Because I don't think the Mulkey case is going to teach
22 anyone anything.

23 THE COURT: Let's come back to that. I want to talk
24 about a couple of other issues.

11:34:44 25 MR. LOPEZ: Your Honor, I'm sorry. Ms. Reed Zaic

11:34:48 1 wanted me to tell you that, and she's the one who's in charge
2 of all this, we will shorten our MSJ and *Daubert* responses to
3 meet your schedule.

4 THE COURT: Okay.

11:34:58 5 Let's talk about the Simon Nitinol cases.

6 Plaintiff filed a memorandum which said that a
7 portion of the cases are going to be dismissed. I think 31
8 cases will be dismissed. Plaintiffs are going to seek remand
9 of 39. And then there's a handful which plaintiffs don't
11:35:28 10 take a position on yet. 10 cases.

11 Defendants are of the view that the cases that
12 otherwise would be remanded should not be remanded because
13 that would simply result in discovery in 39 cases in
14 different districts and that they should either be made part
11:35:49 15 of this MDL or a new MDL.

16 What is plaintiffs' view on that issue?

17 MR. LOPEZ: Well, I mean, I'm sure you don't want us
18 to start over with the discovery in a different product here
19 because it was never intended to be an MDL for the SNF
11:36:12 20 devices.

21 Sounds to me like counsel may want to move -- if he
22 wants to consolidate those cases he's probably right, they
23 probably should move for another MDL and have those cases
24 transferred to a different MDL. I mean discovery in that
11:36:26 25 case is completely different than the discovery in this case.

11:36:30 1 There will be some crossover, but we've not discovered the
2 Simon Nitinol case as a case that we would try if there are
3 obviously some discovery issues that are relevant to the
4 later cases. But I think --

11:36:48 5 THE COURT: Let me ask you this question, Mr. Lopez.
6 If Simon Nitinol cases were to be made a part of this MDL,
7 this is going to be a question for you, as well, Mr. North,
8 they'd clearly have to be put on a separate track from all of
9 the retrievable filters. We'd be starting with basic
11:37:06 10 discovery again. I think it would be a shorter track because
11 there aren't as many filters at issue. But we're still
12 looking at a discovery period that would take us out a year
13 before we start talking about bellwether trials in Simon
14 Nitinol cases.

11:37:26 15 If we were to do that, would we need to appoint
16 different lead counsel and plaintiffs steering committee for
17 those cases because I didn't see your firm on any of the
18 Simon Nitinol cases listed in the report.

19 MR. LOPEZ: Actually, I was thinking -- as you were
11:37:43 20 saying it, I was thinking that anyway.

21 So I would say that -- I would say yes, however I
22 would at least stay involved from the standpoint of helping
23 whoever those people might be to help navigate through the
24 process based on my historical perspective of what's happened
11:38:09 25 the last three years.

11:38:10 1 I certainly would not want to stay on as lead
2 counsel in a case where we have no cases and we're not -- and
3 we're not prosecuting those cases anywhere.

11:38:24 4 I can't even tell you off the top of my head who
5 those lawyers are. Ms. Reed Zaic was kind enough to take
6 that project and run with it, and she's the one who brought
7 it to where it is now.

11:38:46 8 I would say, yes, Judge, you probably have to have
9 someone at least in addition to Mr. O'Connor and I where
10 Mr. O'Connor and I would probably not be very actively
11 involved and probably more involved for your benefit more
12 than the benefit of whoever the plaintiffs' lawyers might be.

13 So something I haven't thought about, to be honest.

14 THE COURT: There is a listing of Gallagher Law Firm
15 for some of these. Is that different from Gallagher --

16 MR. LOPEZ: Yeah, that's different. That's a Texas
17 firm.

18 THE COURT: Okay. Mr. North, it sounds like if we
19 keep the SNF here, we start a new MDL proceeding with new lead
20 plaintiff's counsel, we start from scratch on -- well, not
21 from scratch, but almost from scratch, on SNF discovery,
22 there's been virtually none of that. And we're looking at
23 another two- or three-year track in this MDL with the SNF
24 cases.

11:39:39 25 Do you see it differently?

11:39:41 1 MR. NORTH: Your Honor, I do think we'd start way
 2 back sort of at the beginning. I agree with that. I do
 3 believe the process for these cases would be -- would not take
 4 as long. First of all, there aren't as many cases. Secondly,
 11:39:54 5 90 percent of the discovery has already been produced as to
 6 what is available with the Simon Nitinol. I'm not sure that
 7 there's huge universe of stuff that hasn't been produce. So I
 8 think we could move much more quickly. Plus only 40 cases
 9 right now. It's not an --

11:40:14 10 THE COURT: But --

11 MR. NORTH: -- deal --

12 THE COURT: -- right now. There were 40 cases -- 49
 13 cases when we started this MDL.

14 MR. NORTH: Fair enough. And a new wave of
 11:40:26 15 advertising. I have to get that in.

16 Your Honor, it's a difficult situation. They
 17 filed -- not these folks here, but people have filed these
 18 cases here.

19 When we brought this up our hope was, like 60 of
 11:40:40 20 them, that people would just dismiss these cases. But
 21 there's some people that want to prosecute them. I think the
 22 statute of limitations will have run on the vast majority of
 23 them. But 40 people are saying we want to keep going.

24 It puts us in a very difficult situation. We don't
 11:40:58 25 want to go back to 40 different jurisdictions throughout this

11:41:02 1 country and duplicate the discovery. It's antithetical to
2 the purpose of an MDL. So that's why we think, as much as we
3 don't like it, we have no alternative to either seek new MDL
4 or have this MDL expanded.

11:41:18 5 And, frankly, Your Honor, I think that would be your
6 choice. I mean, we would file the motion with the JPML
7 asking for either/or. Our preference would definitely be,
8 because of your historical knowledge, to stay here. And as I
9 understand the process, the JPML would then contact you and
11:41:34 10 say what do you want to do? And it would ultimately be your
11 choice.

12 THE COURT: I turned down a new MDL this week. I
13 did.

14 MR. LOPEZ: You're welcome.

11:41:58 15 THE COURT: All right.

16 Well, here's my view on this case. My view is that
17 I agreed and the parties agreed that we would try the Mulkey
18 and Tinlin cases.

19 We should try the Mulkey and Tinlin cases.

11:42:20 20 I understand the point we've already tried Eclipse
21 and G2 cases. I agree we should try a Recovery case. But I
22 also agree that the identity of the filter is not the only
23 factor in the play and the extent of the injuries is
24 relevant. That was known when the bellwethers were picked
11:42:40 25 and known when the bellwethers were scheduled. I don't think

11:42:48 1 I should decline to try Murkey now -- Mulkey now,
2 notwithstanding the arguments that have been made.

3 So I'm going to try Mulkey and Tinlin.

4 The question then becomes the order in which they're
11:43:02 5 tried. They're going to be tried in February and May, that's
6 the only dates I have in the first half of next year, and I'm
7 certainly not going to push it beyond the first half of next
8 year.

9 I am concerned that in Tinlin we're in a situation
11:43:19 10 where you haven't done fact or doctor depositions and here we
11 are in October 4th. I appreciate your willingness to do all
12 expert depositions in a week, but I have my doubts about it.

13 There's the question mark of Mrs. Mulkey's health,
14 but it sounds like we're not going to learn more on that;
11:43:47 15 she's sort of in a hiatus to see if other problems develop.
16 We do need to rule on the motion for summary judgment, I
17 agree.

18 I think what I'm inclined to do is try Mulkey in
19 February and try Tinlin in May; get the Mulkey summary
11:44:04 20 judgment decision out as quickly as we can, which hopefully
21 will be within a couple of weeks so that if I do grant it --
22 I don't think there are many cases where it's going to be
23 granted. It's a very fact-specific determination that needs
24 to be made when they were on notice and Kruse was unique, in
11:44:21 25 my view, because of what I thought was a clear record of when

11:44:24 1 she was on notice. I don't know if that will exist in Mulkey
2 but we will certainly look at that.

3 And we should move forward and plan to try Mulkey in
4 February, get the Tinlin work done on a reasonable schedule
11:44:41 5 that gets it all finished and try Tinlin in May.

6 I am not -- one of the questions that was left over
7 in one of the past case management orders is whether we
8 should pick a sixth bellwether trial. I don't think we
9 should. And the reason I don't think we should is that I
11:45:00 10 actually think it would be good and informative for you to
11 try one of these cases in front of a different judge and in
12 front of a different state's jury.

13 Judges will see things differently than I do and
14 make different evidentiary calls and different calls on how
11:45:17 15 much time to afford the parties. Juries from other states
16 may see things differently. I think that would be
17 informative.

18 You now have ten mature cases that are ready for
19 trial. You can try one or more of those. You've got state
11:45:31 20 cases, you can try one or more of those. You have the
21 ability to try them because you've got the ability to settle
22 them or not settle them.

23 So my view is, rather than pick a sixth bellwether
24 trial to be tried in front of me and in front of an Arizona
11:45:46 25 jury, if another trial is needed to inform you, you should

11:45:50 1 try one of those other cases in front of a different judge
2 and a different state's jury.

3 So I'm not going to hold a sixth bellwether trial.

4 Now, I need to think about what to do with Simon
11:46:05 5 Nitinol. That's a different set of issues.

6 In light of that, what I think we should do is get
7 the schedule in place for both the February and May trials so
8 that everybody knows what's going to happen between now and
9 the end of May.

11:46:24 10 Mr. O'Connor, were you going to say something?

11 MR. O'CONNOR: Yes, Your Honor. I feel like I need
12 to save a little face here. I did appreciate Mr. North giving
13 us that extension. As a matter of fact, the lawyers that are
14 working on this have e-mailed us and said they're working on a
11:46:39 15 report to them today on the status of the depositions and the
16 waiver period.

17 So a ball was not dropped, at least not
18 intentionally. It's just that it takes a lot to get ahold of
19 doctors in different states. And so I'm sure they'll -- I'm
11:46:58 20 hoping they will get the status today on what's going on with
21 Tinlin.

22 THE COURT: Okay. Thank you.

23 MR. LOPEZ: Your Honor, is it possible for us to
24 simultaneously try to get those cases ready for the February
11:47:10 25 trial? I would hate to lose that date if something happens to

11:47:13 1 Ms. Mulkey, whether the statute or she has another
2 neurological event. I would not want to wait until May. At
3 least let us give it a shot to get that case worked up and
4 ready for the February slot in the event that becomes the more
11:47:33 5 feasible thing to do.

6 THE COURT: What are your thoughts?

7 MR. NORTH: We're certainly willing to give it a try.
8 We tried to give it a try under the Court's original schedule.
9 I have my doubts it will work out. But we need to get it
11:47:54 10 prepared anyway so I agree, let's continue to prepare it. But
11 I think it's more realistic to think about Mulkey being ready,
12 because it is ready, in February.

13 THE COURT: Well, the schedule we have in place with
14 the exception of the *Daubert* and summary judgment briefing
11:48:11 15 schedule for Tinlin, would have it ready for February. If you
16 can meet it. If you can really depose the experts in the time
17 that's allowed and the other experts in the time that's
18 allowed. I'm not opposed to you attempting that. Because if
19 I do grant summary judgment in Mulkey or if she develops more
11:48:29 20 problems healthwise, it would be good to use that February
21 trial date and not push it off until May. So --

22 MR. LOPEZ: I'm sorry. Didn't mean to interrupt.

23 THE COURT: Go ahead.

24 MR. LOPEZ: I know it's probably not going to make
11:48:44 25 much difference now but I just wanted to correct the record

11:48:46 1 about how we submit these cases. Keep in mind that we
2 submitted -- we agreed to the first lineup. We had two
3 Eclipse cases. And because we thought the case -- the Hyde
4 case everyone agreed was a G2X case and we ended up having to
11:49:03 5 try another Eclipse case with Eclipse evidence that is not --
6 does not exist in a G2X case. Mulkey will be three Eclipse
7 cases in a row, essentially, with three Eclipse evidence. And
8 the way -- that patient brochure thing and some of the things
9 that happened in the Eclipse case are much different than just
11:49:28 10 trying a straight G2 case. I would have loved to have just
11 tried a straight G2X case here, but we didn't. We had to try
12 an Eclipse and G2X case. But I wanted Your Honor to
13 understand we only agreed to lineup thinking we had only two
14 Eclipse cases in it, not three. We ended up having
11:49:44 15 essentially three of the first five cases being Eclipse cases.

16 THE COURT: I understand that. That's fair.

17 Let's talk about the schedule, then.

18 What I'm going to do is leave in place the Tinlin
19 schedule that's in place now, but I want to adjust the motion
11:50:02 20 dates, as I indicated a moment ago.

21 So what we will do -- and it looks as though a go or
22 no-go decision on whether it's Mulkey and Tinlin, I'm
23 intending it to be Mulkey unless she can't go or I grant
24 summary judgment, will need to be made by November 30th.
11:50:24 25 Because November 30th will be the date when I'm going to

11:50:27 1 require you to submit proposed changes to the jury
2 questionnaire that will go out.

3 Actually, I need to adjust that. Let me get the
4 right calendar up.

11:50:47 5 I'm actually going to make that instead of
6 November 30th I'm going to make it November 26th.

7 And then I'm going to have the clerk mail out jury
8 questionnaires in the February trial on November 30th
9 instructing prospective jurors to return the questionnaires
11:51:12 10 by January 4th. That's a week longer than the return period
11 we've had in other cases, but we've also got the holidays at
12 the end of December in there.

13 Sticking with jury selection for a minute, we will
14 have the thumb drive available for you to pick up
11:51:32 15 questionnaires on January 11.

16 I will give you the list of people I propose to
17 excuse for hardship by January 18th.

18 And we will hold a final pretrial conference on
19 Monday, January 28, which is the only date I've got in late
11:51:52 20 January because of those criminal trials. So it will be
21 January 28th at 10:00 a.m. for the final pretrial conference
22 for the February trial.

23 And the February trial will begin on February 11
24 which is a Monday, at 9 am.

11:52:15 25 The dates, which we previously set aside for the

11:52:17 1 February trial and will remain the same will be the 11th
2 through the 15th, the 19th through the 22nd, and Monday,
3 February 25 through Friday March 1st. That will be the same
4 number of trial days we had for this trial. My intent is to
11:52:40 5 grant plaintiffs 33 hours and defendants 30 hours of trial
6 time.

7 With respect to dispositive motions, I am going to
8 compress the schedule a bit so that dispositive and *Daubert*
9 motions will be due by December 7th. That's the date I
11:53:09 10 already have on the Tinlin schedule.

11 Responses will be due by December 21st. And replies
12 by December 28th. And that will allow me time in early
13 December before I get into the criminal trials to rule on
14 those motions.

11:53:40 15 Motions in limine will be due by December 14th and
16 responses by December 28th.

17 Deposition designations by December 14th, because
18 I'm just not going to have time in January to spend on those.
19 I hope we have fewer for the next trial. We had over 30 for
11:54:19 20 this trial. I don't know if we can reduce it or not, but
21 I'll deal with what comes in.

22 The final pretrial order will be submitted on
23 January 11th for the final pretrial conference on
24 January 28th.

11:54:44 25 For the May trial, changes to the jury

11:54:49 1 questionnaire, proposed changes, will be due on March 1st of
2 2019. We will mail the questionnaires on March 8th, with a
3 return date of April 5th. We will give you the thumb drive
4 with questionnaires on April 12th. I'll provide the list of
11:55:24 5 hardship excusals on April 19, and we will hold the final
6 pretrial conference on Tuesday, April 30th, at 10:00 a.m.

7 The trial will begin on Monday, May 13th at
8 9:00 a.m. And the trial days for that trial will be May 13
9 through the 17; May 20th through the 24th; and --

11:56:21 10 Do we have something on May 27th, Traci?

11 THE COURTROOM DEPUTY: That's Memorial Day.

12 THE COURT: Ah, Memorial Day.

13 Well, it will include May 28th through the 31st,
14 which is a Tuesday through Friday. So we're losing a day in
11:56:38 15 there.

16 I think those are the dates I'm going to block out.
17 We can talk as we get closer whether we need to find a day
18 before or at end of that. But those are the days we'll set
19 aside for the trial.

11:57:02 20 In terms of the schedule of other events, motions
21 for summary judgment, if it turns out to be Tinlin that's
22 going, I know we've already got one in Mulkey, and *Daubert*
23 motions will be due on February 1st; responses on March 1st;
24 replies on March 15th.

11:57:58 25 MR. STOLLER: Your Honor, I hate to interrupt you.

11:58:01 1 You set a briefing schedule in anticipation -- on
 2 those motions in anticipation at least on summary judgment
 3 for the trial you scheduled in February. The Mulkey stuff is
 4 briefed, so would we be doing --

11:58:14 5 THE COURT: Are the *Daubert* motions briefed for
 6 Mulkey?

7 MR. STOLLER: I don't believe that's the case. My
 8 only point is I think if we're going to run Tinlin up as
 9 effectively as a backup, we'll probably need to do all that
 11:58:28 10 briefing on the schedule you've given us already.

11 THE COURT: Well, but the problem with that is -- or
 12 my concern about that is once we mail out those jury
 13 questionnaires identifying the trial, then we're getting
 14 responses based on the specific case. You can't really change
 11:58:45 15 course. So if we've decided -- we've got to decide if it's
 16 Mulkey or Tinlin when the jury questionnaires go out.

17 MR. STOLLER: True.

18 THE COURT: My thought was if it's going to be
 19 Mulkey, why press you to do the Tinlin briefing in December
 11:59:05 20 when it's not going to be necessary until later.

21 In other words, I don't know -- I understand your
 22 thought, Mr. Stoller, that we could do it and then we could
 23 switch even late in the game, but then we're switching with a
 24 jury panel that hasn't addressed issues in the Tinlin case.

11:59:22 25 MR. STOLLER: I'm not disagreeing with that and it

11:59:24 1 wasn't my suggestion -- and I thought of that as you were
2 talking about the jury questionnaire. I think we have to have
3 some kind of a drop-dead date of determination, which we
4 haven't talked about.

11:59:34 5 I was only thinking that we're going to run -- I
6 don't want to say run to standstill, but we're going to run
7 on our end to get everything done in Tinlin, including, we
8 would think, the briefing we're talking about here. And I
9 think you indicated that the mail-out date on the proposed
11:59:50 10 change -- I guess November 26th is before the briefing, so
11 we'll need to know then.

12 THE COURT: That was my thought. I think that sort
13 of needs to be the drop-dead date. If it's Mulkey, why force
14 you to do the Tinlin briefing in December.

12:00:04 15 MR. STOLLER: I understand. Apologize.

16 THE COURT: That's all right.

17 Motions in limine for the May trial would be due on
18 March 29th, with responses due on April 12th.

19 Deposition designations would be by March 29th.

12:00:34 20 The proposed final pretrial order would be due on
21 April 12th with the final pretrial conference, as I already
22 indicated, to be on April 30th.

23 Any other concerns or thoughts about that schedule?

24 MR. LOPEZ: Not from the plaintiffs.

12:01:03 25 MR. NORTH: None from the defendants, Your Honor.

12:01:05 1 THE COURT: Okay. We'll put that in an order that
2 comes out.

3 It seems to me two issues that we need to address
4 before that drop-dead date are the Mulkey motion for summary
12:01:25 5 judgment, and we'll turn to that immediately and get a
6 decision to you as soon as we can, and then her health
7 condition.

8 So I think what I will do is leave it to you all to
9 communicate about that before November 26th. And if
12:01:44 10 Ms. Mulkey can't be going to trial in February or if that's
11 an issue you disagree on, that's going to need to be brought
12 to me before November 26. And, of course, November 26th is
13 the Monday after Thanksgiving.

14 So, really, if there's going to be a disagreement on
12:02:10 15 whether Ms. Mulkey can go, that issue ought to be brought to
16 me during week of November 12 so we can get a hearing
17 scheduled to resolve that before the Thanksgiving break so
18 you know which jury questionnaire proposals to put in on the
19 26th.

12:02:32 20 Let me make a note here.

21 Okay. I want to think about what the right -- I
22 want to think about how I will answer the question of whether
23 I should take a SNF MDL and I'll let you know in the next
24 week or so. There would be efficiencies involved in doing it
12:03:28 25 here, obviously. But I've got to think about whether the

12:03:34 1 reasons I turned down the other MDL should carry weight here
2 as well. So I just want to think about that.

3 Let me mention two other things.

4 When you do your jury instructions for the next
12:03:49 5 trial, please don't do them in the form you did them for this
6 trial. What we had were four different sections: Agreed
7 upon, disputed, additional sections.

8 Instead, take the instruction set you think most
9 closely represents the Mulkey case, whether Jones or Hyde or
12:04:14 10 Booker, and go through it. And if you get to the instruction
11 on design defect, put in that section everything you agree
12 upon, everything you dispute, and every supplemental
13 instruction you propose to make on design defect.

14 What we end up having to do, it happened on the
12:04:38 15 floor of my study at home, was I was sorting them into piles.
16 Okay what are the design defect issues? And I had to -- I
17 did this for the last trial, not this one. Jeff got to do it
18 for this one, to try to sort into piles what really are all
19 the instructions you're proposing on design defect, because
12:04:55 20 they were in different sections.

21 So just put everything on design defect in one
22 section. If you've got agreement, put it in there. If
23 you've got disputes, put it in there. If you've got five
24 supplemental instructions on the topic, put it in there.

12:05:10 25 Then that way we know this is everything that's

12:05:12 1 being proposed and disputed on design defect.

2 If you can do that, that will save us some shuffling
3 and organizing.

4 And plaintiffs, when you propose an instruction,
12:05:23 5 propose one specific to the case. In this trial what we got
6 were form instructions with blanks that are in the Wisconsin
7 instruction with brackets, "if you're going to do this" -- it
8 didn't help at all. You just submitted the Wisconsin form
9 with nothing tailored to this case. So that doesn't tell us
12:05:41 10 what you really want. So tailor them, if you would, to the
11 case.

12 The last thing I had on the list was the motion to
13 seal briefing.

14 We've got a date, I think, of October 26, Ms. Helm,
12:05:59 15 for Jones. If you're going to want to do it for Hyde, I
16 guess my question is should we just wait and do it once for
17 both cases?

18 MS. HELM: Actually, Your Honor, I thought that's
19 what we had decided previously.

12:06:12 20 THE COURT: We did decide that?

21 MS. HELM: Yes.

22 THE COURT: Oh. Okay. Will October 26 work? Are
23 you going to have what you need from this trial by then?

24 MS. HELM: I think so.

12:06:25 25 THE COURT: Okay. So that will remain October 26th.

12:06:32 1 All right. What else do we need to address?

2 MR. LOPEZ: Just one of the things I brought up in
3 the beginning: Your thoughts on not just remanding all of the
4 cases at one time but maybe having us engage in either
12:06:46 5 settlement discussions about maybe the G2 cases or all the
6 fracture cases or maybe remanding the G2 cases. Since we're
7 not going to try another G2 bellwether case, we can start the
8 process of educating lawyers on the trial of those cases, the
9 value of the cases, as opposed to waiting and all of a sudden
12:07:11 10 these things get inundated all over the country by the
11 hundreds if not thousands. I'm sure that's a large number of
12 the docket, Your Honor, the G2 cases. They were on the market
13 the longest. I don't know if that's something you want to
14 resolve now, but I think we ought to give it some thought.

12:07:28 15 MR. NORTH: Again, Your Honor, I think that's looking
16 at the bellwether process from only one data point
17 perspective. As I already argued earlier, I believe the
18 nature of the injuries, regardless what generation filter, is
19 just as important for the bellwether process and we need to
12:07:43 20 complete this. We're only talking about through May at this
21 point.

22 THE COURT: So what do you think, Mr. North, that I
23 should do on remand? When it comes to the -- I will tell you,
24 I told you before, after we get through the bellwether trials,
12:07:59 25 I don't intend to hold on to this MDL.

12:08:02 1 So my intent would be when we get a verdict in the
2 May trial, obviously we'll need to do -- if there's posttrial
3 briefing, do it. But in June or July, I would remand all of
4 the cases in the MDL.

12:08:16 5 MR. NORTH: I understand, Your Honor. My client has
6 been so notified and we're talking about that. Our hope is
7 that we can be in a position if not beforehand but certainly
8 after the May trial to sit down with the plaintiffs' attorneys
9 and see if a global resolution is possible, because we know
12:08:33 10 the Court's intent is to remand the cases.

11 THE COURT: Well, if you wait until after the May
12 trial to sit down, I suspect you're not going to settle this
13 in a week or two or three. I just have a hunch.

14 And I'm not going to be inclined to say, you know,
15 okay, you've got five months to go talk settlement when you
16 could be doing it now. You know a lot about the case now.
17 We've got a big gap in time. I know we're going to be busy
18 on some things, but there's a fair amount of time between
19 February and May.

12:09:04 20 If I remand these in June of next year, I'm pretty
21 confident you're not going to reach a global settlement
22 between the close of trial, the verdict in the May case, and
23 the date in June. But if I'm wrong, I'm interested in your
24 thoughts on why I'm wrong.

12:09:22 25 MR. NORTH: Your Honor, there are discussions with

12:09:24 1 certain entities or persons ongoing already. So I don't think
2 it's naturally -- or inevitable that there are going to be no
3 settlements before May.

4 THE COURT: Well, I understand your point that the
12:09:46 5 filter type is only one data point.

6 If we are not going to try another G2 case, which
7 we're not, and if my assignment under the MDL statute is to
8 dispose of all pretrial matters, if I were to remand the G2
9 cases sometime in the next few months, you could still have
12:10:23 10 your global discussions.

11 Tell me what's wrong with that. What do you see as
12 the reason that I shouldn't do that?

13 MR. NORTH: Several reasons, Your Honor. Because I
14 think that undermines the bellwether process to some extent,
12:10:39 15 which, as I've indicated, is not filters only -- only filter
16 specific. It has to do with different injuries, also.

17 I also think that we can't have global discussions
18 with plaintiffs -- various plaintiffs' attorneys based on one
19 type of filter.

20 We are not and never will value these cases based on
21 whether they're a G2 or Recovery. That may be one factor but
22 I think more important is was it a fracture resulting in an
23 open surgery versus a case where the filter's in place and
24 just can't be removed. Or doesn't want to be -- the patient
12:11:17 25 doesn't want it removed.

12:11:19 1 Those injuries spectrum is going to determine the
2 value of the cases. And if we try to just pick out G2s
3 alone, I don't think we'll ever reach a global settlement
4 unless we're looking at the whole universe of cases with a
12:11:36 5 particular plaintiffs' firm. So I don't think as a practical
6 matter that's going to exist.

7 And I also think, Your Honor, we've already got the
8 ten mature cases remanded. And if we have 2000 G2 cases, and
9 I think there's probably 1500 to 2000 G2 and G2X, if we have
12:11:56 10 all those remanded, I think it's going to undermine the
11 bellwether process because it's going to divert attention of
12 those people involved in these two trials in handling all of
13 the logistical issues with those cases.

14 So we're only talking about waiting until May or
12:12:14 15 June. I believe that to maintain the usefulness and
16 integrity of the bellwether process to its completion, we
17 need to avoid that.

18 MR. LOPEZ: Yeah, I -- I mean, I frankly think we
19 have at least from the plaintiffs' perspective we have all the
12:12:35 20 data points and information that we need from what we've
21 already done. Of course we didn't know what's going to happen
22 with this trial.

23 And I know what Mr. North is saying, that, you know,
24 it's not just the device in trying to reach a global
12:12:49 25 resolution with people because they all have different types

12:12:52 1 of cases.

2 But I also think if this is going to lead to not a
3 global resolution either by firm or globally as to everybody,
4 we ought to think about whether or not -- I mean, I've had a
12:13:08 5 lot of -- I'm ready -- I've been ready to do that with Bard
6 for the last four, five years. They've never come to me.
7 We've got a lot -- my firm, my cases, we have a lot a data
8 points with them and there's been no sign at all ever that
9 they're interested in talking to me about my cases globally.
12:13:27 10 And I've been -- this is my fourth trial.

11 So I'm a little suspicious about whether or not that
12 is going to make a difference, at least for me and my expanse
13 of cases.

14 My thought, my concern, is this, Judge, is that if
12:13:46 15 in fact, you know, the plan is to say, no, we're not going to
16 pay globally to people, we're going to have to start trying
17 cases, I don't want that to happen a year from now. Some of
18 these poor people have been -- I've got clients that filed
19 five years ago. And, you know, who might have had a trial
12:14:11 20 date by now and their cases resolved. And I do have a couple
21 in the state court case here.

22 But I really think in order to kind of get people
23 moving and discussing the cases that we've got really good
24 data points on cases that have settled and now a third trial.
12:14:30 25 A fourth trial, actually, because they tried a case before.

12:14:34 1 We learned a lot from both of these trials. They
2 learned a lot. We learned a lot from the type of injury that
3 was in Mrs. Booker's case and the vintage and the evidence in
4 the G2 case.

12:14:49 5 We've been doing this a long time. Mr. North has
6 been involved in mass torts, I've been involved in mass
7 torts. This is my fourth decade. You extrapolate from the
8 knowledge you get. You don't have to now figure out if the
9 migration to the heart of a G2 that was put in in 2007
12:15:08 10 required open-heart surgery and got a one-to-one ratio of
11 punitive damages in front of an Arizona jury, we've all been
12 doing this long enough to say that might be the very top end
13 value of these cases, and it was in front of a jury, what
14 would I do with that case if I was getting ready to try it?

12:15:28 15 The sophistication of sitting down and having
16 discussions with these data points is something we normally
17 don't have in an MDL or mass tort. More often than not these
18 cases settle without a single trial. And now we've had two.

12:15:52 19 And I really think it makes some sense to stage this
20 thing for the benefit of the people that have been in this
21 for a long time and for the benefit of what we learned from
22 at least trying a G2 case with what might be a top-end
23 injury, you know. I mean, that was a fairly dramatic injury.
24 We understand that might be near the top level value of those
12:16:15 25 cases. Case like Mrs. Jones where she didn't get open heart

12:16:19 1 surgery, if that thing was being discussed in a global
2 settlement, we've learned some things.

3 But I'm very concerned that this is a process where
4 delay is not doing the plaintiffs in this case any good.

12:16:35 5 We're talking about real people who are waiting for a process
6 that, unfortunately, they're not in a program where cases are
7 getting close to trial where they might be able to settle
8 with some other cases like what happened in Arizona and other
9 locations.

12:16:52 10 So I just think that both sides know enough about
11 each side and what these cases are about and what each side
12 does with these cases and there's no reason why we can't
13 start the process somewhere with what we've learned thus far.

14 THE COURT: Well, Mr. Lopez, couple of times in what
15 you've said you talked about starting the process. And I
16 understand, I think, what you're saying.

17 It's -- I don't know this but I'll tell you what I'm
18 assuming. I'm assuming if I were to say on November 1st, I'm
19 remanding all G2 cases, and I were to make that
20 recommendation to the MDL panel and they were to agree with
21 it, what would happen after November 1st would be all of
22 these lawyers that have these cases around the country would
23 get them back. All of the judges around the country would
24 have them hit their dockets. Scheduling orders would be
25 entered. Parties would be going into court around the

12:18:04 1 country setting trial dates. Lawyers would be looking at
2 their own inventory and asking what do I do now? Do a pick a
3 good case and push it to trial? Do I start talking
4 settlement?

12:18:17 5 You would no longer be lead counsel in all of those
6 1500 G2 cases. There may be plaintiffs lawyers who still
7 want to collaborate with you and talk global settlement, but
8 there may not be.

12:18:35 9 It seems to me that -- I guess what I'm saying is if
10 I just remand a chunk of the cases, I'm not sure that starts
11 the process on global settlement. Seems to me it kind of
12 blows it up in a way and puts you all at the mercy of judges
13 around the country who are going to start setting trials and
14 complicates the case tremendously.

12:18:57 15 Sure, it puts pressure on defendants to talk global
16 settlement before November 1st because otherwise they've now
17 got to gear up and start fighting a battle in 50 states. I
18 understand that. I guess -- I'm just sort of thinking out
19 loud.

12:19:16 20 One approach would be to say I'm going to pick a
21 remand date in June of next year and I'm going to remand on
22 that date. And, in addition to that, I'm going to order you
23 all to start settlement talks, and set a date by which you
24 sit down face to face for good faith settlement talks, which
12:19:40 25 I do in every civil case I've got, either alone or with

12:19:43 1 mediation, and try to start the process in that way, with you
2 all knowing the cases are going back to their states when we
3 finish that last trial. That's an alternative to just
4 remanding a bunch.

12:20:00 5 MR. LOPEZ: I mean, I understand that. I probably
6 shouldn't have said just remand.

7 What I'm trying to say is let's see whether or not,
8 based on the data points we have thus far, at least on a G2
9 case and Eclipse case, I know we're going to try another
12:20:15 10 Eclipse case -- I mean Mr. North just said he's already
11 talking settlement with other people right now. I know
12 they've settled a number of cases that -- some of which are
13 very similar to the cases that we've tried already. Some
14 even with injuries that are more significant.

12:20:33 15 My suggestion to you, Your Honor, is this: Why not
16 order the parties to engage in some type of mediation.
17 They've been using the same individual -- in fact, he's from
18 Phoenix -- no matter where the case is. We did one in
19 Florida, he was involved in the one in Delaware, and also
12:20:53 20 involved in settling, very successfully settling, a group of
21 cases here in Arizona.

22 THE COURT: Who is that?

23 MR. LOPEZ: Is it Craig Phillips?

24 MR. O'CONNOR: Craig Phillips.

12:21:05 25 He knows -- he has seen 11 or 12 -- I don't know how

12:21:09 1 many it is. I don't want to overstate it. 11 cases maybe?
2 How many were settled here? Four, five? Seven or eight
3 cases. Different courts, different venues. Because those
4 cases were getting close to trial.

12:21:25 5 What I'm suggesting to you is at least have the
6 parties engage in a conversation about Eclipse and G2, at
7 least G2 cases, and see where we are in two months.

8 If it looks like we can't settle G2 cases based on
9 the data points we have, not only from this trial but from
12:21:45 10 other settlements -- I mean, I had a number of G2 cases
11 settle before there was even an MDL. So we kind of know the
12 ranges.

13 In fact, I even have a chart, not with numbers in
14 them but the different criteria for the values.

12:21:58 15 And then if that's not successful in the next two
16 months, it's not going to be any more successful eight or
17 nine months from now. And then we know that those cases have
18 to be remanded.

19 But I think it's time to give the plaintiffs in this
12:22:18 20 case who've been waiting a long time an opportunity to see
21 whether or not the cases can settle over the next month or
22 two. Mr. North actually said, I think at the last CMC, he
23 thought his client might be ready by the end of the year.
24 Now we're talking May or June. That's a little different.
25 They can wait as long as they can wait. I felt very strongly

12:22:41 1 for people here that have been involved in this process for a
2 long time, especially my own clients who, you know, have been
3 represented four, five, six years.

4 I was fortunate enough to have a number of those
12:22:58 5 cases set for trial that got settled. But I'm concerned
6 about the ones that don't have trial dates and whether or not
7 this bellwether process is really going to have an effect on
8 whether C.R. Bard is going to be willing to settle their
9 cases without now being sent out all over the country and me
12:23:14 10 doing what I was doing before this MDL, which is one trial at
11 a time before they settle.

12 So I think it's time to test that process on a
13 finite number of cases based on the data points we have not
14 only from the trials we have but the settlements that have
12:23:30 15 happened in other jurisdictions where a lot was learned just
16 from going through that process.

17 And, you know, we can report back in two or three
18 months. Who knows, that might lead to larger settlements.
19 He said he's talking to a number of people right now. It's
12:23:50 20 not me. But he's having discussions. There have been a lot
21 of discussions -- keep in mind that each one of those
22 settlements that have happened have been a variety, much
23 broader variety of cases than we've seen in this bellwether
24 process. Much wider variety. And I know the people that
12:24:06 25 have been involved in. Some of those cases I was attorney of

12:24:09 1 record. Those were agreed upon values in those kinds of
2 cases. There are hundreds and hundreds of cases like that in
3 this MDL.

12:24:24 4 So I don't know what else to say other than the fact
5 why can't we learn and take advantage of that process and
6 what's happened there and the trials to see whether or not
7 C.R. Bard is really interested in a global settlement of
8 those type of cases or whether or not it's going to be 2025
9 when we start getting near the tail end of the people who are
12:24:41 10 getting an opportunity to try the case before they get
11 settled. That's what I'm saying, Judge.

12 THE COURT: I understand your point.

13 Mr. North.

14 MR. NORTH: Just a couple comments, Your Honor.

12:24:49 15 Mr. Lopez just said he has doubts as to whether this
16 bellwether process really has an effect. I have doubts as to
17 whether it can have any effect if we don't let it run its
18 course.

19 Right now our estimates are 50 to 70 percent of
12:25:06 20 these cases may be no-injury cases. I think the Cook
21 defendants in the Cook MDL have reached the same conclusion
22 about their MDL: 50 to 70 percent of the cases may be no
23 injury.

24 Right now my client is probably not willing to pay
12:25:24 25 in a no-injury case. If they try Mulkey, which is close to a

12:25:27 1 no-injury case and they're successful there, my client may
2 rethink it. But it's not based on the sole data point, our
3 valuation of the case as to whether it's a G2 or Eclipse.
4 The nature of the injury is much more a driving factor.

12:25:43 5 And we have got, in my view, to let this bellwether
6 process conclude before we have the data points to really
7 have those sorts of discussions as far as everything is
8 concerned.

12:25:58 9 Now, if this Court orders us into mediation or into
10 settlement discussions, we certainly will do so, and we will
11 do so in good faith. At I've said, we are having some
12 discussions and getting started in that regard. We can't
13 talk to everybody at once, but we are doing that and starting
14 that.

12:26:16 15 I will tell you that my client, the attorneys who
16 work -- Ms. Camarata and her colleagues in the law department
17 have had a lot of experience with mass tort litigation over
18 the years and have resolved a number of MDLs. And they're
19 committed to doing so in this case. The question is going to
12:26:37 20 be values.

21 And I also can assure the Court that I do not
22 believe my client's going to wait until June and have 4,000
23 cases simultaneously remanded. That's a disaster for them
24 and plaintiffs. We recognize that.

12:26:50 25 I think as we enter into 2019, discussions are going

12:26:54 1 to accelerate and I think that we will make a lot of strides
2 as the first six months of that year progresses. But I don't
3 believe we should hinder the operation of this bellwether
4 process and its success by throwing some cases back to the
12:27:14 5 trial courts at this stage. So we believe we should stay the
6 course and we're confident it's going to work the way it's
7 intended to do.

8 THE COURT: Okay. Thanks. I'll address this issue
9 in the order that comes out. I want to think about it a bit
12:27:29 10 more in light of what you've said.

11 Are there other matters we need to talk about before
12 we break?

13 MR. LOPEZ: None from the plaintiffs, Your Honor.

14 MR. NORTH: Nothing for the defendant, Your Honor.

12:27:40 15 THE COURT: Okay. Thanks. We'll let you know when
16 we hear something from the jury.

17 (End of transcript.)

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C E R T I F I C A T E

I, PATRICIA LYONS, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control, and to the best of my ability.

DATED at Phoenix, Arizona, this 6th day of October,
2018.

s/ Patricia Lyons, RMR, CRR
Official Court Reporter